

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PEREZ ALVARADO,

Defendant and Appellant.

B300976

(Los Angeles County
Super. Ct. No. LA089790)

APPEAL from the judgment of the Superior Court of Los Angeles County. Martin L. Herscovitz, Judge. Affirmed.

Carolyn D. Phillips, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Deputy Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Michael Perez Alvarado was convicted of second degree robbery. The court imposed a third strike sentence of 35 years to life. Defendant contends the court erred in instructing with CALCRIM No. 315 which tells the jury to consider how certain the eyewitness was when he or she made an identification, among a dozen or more other circumstances of the identification. He further contends the court erred in imposing a third strike sentence because his two prior convictions were not pled as strikes.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with one count of second degree robbery (Pen. Code, § 211). It was alleged defendant had suffered two prior serious felony convictions: a 2008 conviction for robbery and a 2006 conviction for burglary. (§ 667, subd. (a)(1).) The two priors were also alleged as prison priors (§ 667.5, subd. (b)) and as prior convictions requiring a state prison sentence (§ 1170, subd. (h)(3)). The two priors were not alleged to be prior strikes. Yet, throughout the trial, the parties and the court operated on the assumption the “Three Strikes” law applied. Before voir dire began, the court asked, in connection with determining the correct number of peremptory challenges, whether the prosecutor would be asking for a life sentence. The prosecutor said she would be. Defendant did not object or make any statement on the record that prior strikes, the sole basis for obtaining a life sentence, had not been expressly alleged in the information.

The testimony at trial established the following material facts. On the afternoon of February 23, 2018, Ido Sagir had driven to a friend’s apartment in North Hollywood. As he got out

of his car and grabbed his guitar from the back seat, a man approached him with his hand in his pocket. It looked like he had a gun. The man ordered him to the ground and demanded his wallet. Mr. Sagir complied. The man then ran across the street to a blue SUV and fled.

Mr. Sagir called 911 within a few minutes. He told the 911 operator he was “mugged” by a male Hispanic, in his 40’s or 50’s, about five feet eight inches or five feet nine inches tall and 140 to 150 pounds. He said the man drove off in a light blue Jeep or older-type SUV. Mr. Sagir could not recall what the man was wearing. The 911 call was played for the jury.

Officer Luke Burke arrived on the scene and obtained a description of the robbery suspect from Mr. Sagir consistent with what Mr. Sagir told the 911 operator but with the additional details that the man had brown hair and was wearing a dark jacket and dark blue jeans. Officer Burke testified Mr. Sagir was unable to provide any further details.

The following day, a blue SUV that had been reported stolen was found in the parking lot of a gas station. Officers saw defendant sleeping inside the vehicle. Mr. Sagir’s stolen credit cards, as well as items belonging to the owner of the stolen SUV, were found on defendant and inside the vehicle.

Several days later, Mr. Sagir went to the police station and looked at a photographic lineup consisting of six photographs. He circled the individual in photograph number 4 (a photograph of defendant) and wrote “[t]he man in number 4 looks like the man who robbed me.”

Mr. Sagir identified defendant in court as the person who robbed him. When asked at trial if he was confident the person in photograph 4 of the photographic lineup was the person who

robbed him, Mr. Sagir said yes. Mr. Sagir also said he was shown photographs of the stolen SUV and he said it looked similar to the vehicle in which the robber fled. On cross-examination, Mr. Sagir conceded he was frightened during the incident and that it all happened quickly, probably between 30 seconds and one minute.

Defendant testified and denied robbing Mr. Sagir. He said he found the SUV abandoned in a parking lot and got inside to sleep because he did not have a place to stay. He admitted he found some items inside the SUV, including some credit cards, and put them in his pocket.

Before closing arguments, the court discussed the priors with counsel and defendant. The court told defendant, “as you know” there are priors “alleged in the information as both strikes and as five-year priors and one-year priors.” The court explained the relevance of the prior convictions in the event the jury convicted him, including that he could face a maximum sentence of 35 years to life. The court explained defendant’s right to a jury trial to decide the truth of the alleged prior felony convictions. Defendant acknowledged his rights, waived his right to a jury trial and agreed to a bench trial.

The jury found defendant guilty. After a bench trial on the prior convictions, the court found the prior convictions qualified as strike priors and prior serious felonies. The court dismissed the prison prior allegations, explaining it had failed to take defendant’s waivers as to the one-year enhancements.

At the sentencing hearing, defense counsel stated he wanted to file a written motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and to present information from defendant’s mother that was relevant to sentencing, but

that defendant “takes a different view” and “would prefer to be sentenced today.” The court allowed defense counsel to make an oral *Romero* motion to strike either or both of the prior strikes. After entertaining argument, the court denied defendant’s motion.

The court imposed a third strike sentence of 25 years to life, plus two consecutive five-year terms for the prior serious felony enhancements. The court awarded defendant 608 days of presentence custody credits and imposed various fines and fees.

This appeal followed.

DISCUSSION

1. CALCRIM No. 315

The court instructed with CALCRIM No. 315 which begins with the following language: “You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.” The jury was then told to “consider” numerous circumstances of the eyewitness testimony, one of which is “How certain was the witness when he or she made an identification?” The instruction concluded by telling the jury that: “The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.”

Defendant did not object to this instruction in the trial court. On appeal, among the 14 circumstances the jury was told to consider, defendant only claims the court erred by telling the jury to consider the one circumstance of how certain the witness was when he made the eyewitness identification. Defendant did not ask the trial court to delete or modify this one circumstance

from the lengthy pattern instruction. Defendant has therefore forfeited his claim of error. (*People v. Sanchez* (2016) 63 Cal.4th 411, 461 [claim of instructional error forfeited because trial court has no sua sponte duty to modify pattern eyewitness identification instruction].)

We reject defendant's claim his trial counsel was ineffective for failing to object to the instruction and his argument we should resolve his claim, notwithstanding his forfeiture, because the instruction violated his substantial rights. (Pen. Code, § 1259.)

Sanchez "reiterated three decades of California Supreme Court precedent that a trial court may instruct the jury to consider eyewitness certainty." (*People v. Rodriguez* (2019) 40 Cal.App.5th 194, 199-200.) CALCRIM No. 315 accurately sets forth existing law, and defense counsel was not ineffective for failing to challenge the instruction, nor were defendant's due process rights violated by the giving of the instruction.

Defendant points out that the Supreme Court is currently considering whether the certainty factor in CALCRIM No. 315 violates a defendant's due process rights in *People v. Lemcke*, review granted October 10, 2018, S250108. The Supreme Court has not yet issued a decision in *Lemcke*. *Sanchez* remains valid law, and we are bound to follow it.

In any event, assuming for the sake of argument there was instructional error, we conclude there was no prejudice given the evidence demonstrating defendant's guilt.

2. The Third Strike Sentence

Defendant contends imposition of a third strike sentence was unauthorized because the prosecutor failed to comply with the pleading requirements of the Three Strikes law.

Prior strikes must be “pled and proved.” (Pen. Code, § 667, subd. (c), § 1170.12, subd. (a).) The information alleged defendant’s two prior felony convictions (a 2008 conviction for robbery and a 2006 conviction for burglary) as five-year serious felony priors (§ 667, subd. (a)(1)), as one-year prison priors (§ 667.5, subd. (b)) and as prior convictions requiring a state prison sentence (§ 1170, subd. (h)(3)) but did not allege them as strikes under section 1170.12 or section 667, subdivisions (b) through (j).

“[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 747 (*Mancebo*).)

When a defendant has not received fair notice from the charging document or otherwise before the case is submitted to the jury that the prosecution will seek to increase punishment based on uncharged enhancement allegations, courts have stricken the sentence enhancements. (*Mancebo, supra*, 27 Cal.4th at p. 754 [striking gun use enhancements because the defendant had no notice that unpled multiple victim circumstances would be substituted to support One Strike sentencing instead of the pled gun use circumstances, in addition to the imposition of separate gun use enhancements]; *People v. Sawyers* (2017) 15 Cal.App.5th 713, 723 [vacating third strike sentence and remanding for resentencing where the information did not allege priors as strikes, and the “first explicit reference to Three Strikes sentencing was in the People’s sentencing memorandum, filed . . . *after* Sawyers had waived his right to a jury trial on the prior conviction allegations”]; *People v. Van*

Nguyen (2017) 18 Cal.App.5th 260, 266-267 [striking the prior serious felony enhancement and the related five-year term where prior conviction was alleged only as a strike and not as a prior serious felony enhancement].)

Defendant cites these cases and others for the proposition that his Three Strikes sentence must be vacated and we must remand for resentencing because the information did not charge his serious felony convictions as strikes. However, where the defendant had actual notice the prosecutor would seek the sentence enhancement before the case was submitted to the jury and did not object in the trial court to the pleading defect, the Supreme Court has found the issue forfeited on appeal. (*People v. Houston* (2012) 54 Cal.4th 1186, 1227-1228 (*Houston*) [the defendant forfeited claim he could not be sentenced to life in prison for each of 10 counts of attempted murder where indictment failed to allege the attempted murders were deliberate and premeditated].) The *Houston* court reasoned: “To the extent defendant contends he was not provided adequate notice of the punishment he faced, we are not persuaded. During the defense’s presentation of its case, the trial court expressly noted that defendant, if convicted, would be sentenced to life imprisonment, and the court asked the parties to say if there was a problem with the proposed jury instructions and verdict forms. One week later, the court said the attempted murder verdict form would include deliberate and premeditated attempted murder as a special finding. At the close of evidence, the trial court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated, and indicated that a special finding on this question appeared on the verdict form. Had defendant raised a timely objection to the jury instructions and verdict forms at any of these stages of the trial on the ground that the indictment did not allege that the attempted murders

were deliberate and premeditated, the court could have heard arguments on whether to permit the prosecutor to amend the indictment.” (*Id.* at p. 1227.)

The Supreme Court in *People v. Anderson* (2020) 9 Cal.5th 946 distinguished *Houston* from *Mancebo* “on the ground that the court in *Houston* ‘actually notified defendant of the possible sentence he faced before his case was submitted to the jury, and defendant had sufficient opportunity to object to the indictment and request additional time to formulate a defense.’ [(*Houston*, *supra*, 54 Cal.4th p. 1229.)] By affirming on forfeiture grounds, *Houston* effectively rejected the notion that a pleading defect necessarily results in an unauthorized sentence.” (*Anderson*, at p. 962 [reversing and remanding for resentencing where trial court improperly imposed five 25-year-to-life enhancements in connection with counts as to which the enhancements had not been alleged].)

Like the defendant in *Houston*, defendant here had actual notice the prosecution was seeking a Three Strikes sentence, both before jury selection, and before the case was submitted to the jury. His sentence was not unauthorized, and he forfeited the claim of error on appeal.

Before closing arguments, the court discussed the priors at some length with counsel and defendant. The court spoke directly to defendant, saying “as you know” there are priors “alleged in the information as both strikes and as five-year priors and one-year priors.” The court explained that “if the jury convicts you of robbery, then the priors become important. They’re important because they’re strikes. The one strike would double the range of punishment from two years, three years, or five years to four years, six years, or ten years. Each of the five-year priors could add five years to that, for a total of ten

years. . . . But then with two strikes alleged, if both those are found to be true and the court does not strike any strikes, then the sentence in the case becomes 25 years to life. And then those five-year priors can be tacked onto that. So that means it could be 25 years to life, 30 years to life, or 35 years to life.”

The court then went on to explain defendant’s right to a jury trial on the prior allegations. At no point did defendant raise an objection or point out to the court that the information did not expressly allege the two prior convictions as strike priors. Defendant stated on the record his agreement to waive his right to a jury trial on the prior allegations and proceed with a bench trial.

Moreover, the record shows that throughout the trial, the parties appear to have been operating on the assumption the Three Strikes law applied, despite the pleading error. Just before voir dire, the court asked, in connection with determining the correct number of peremptory challenges, whether the prosecutor would be asking for a life sentence. The prosecutor confirmed she would be. Defendant did not object or make any statement on the record that strike priors, the sole basis for obtaining a life sentence, had not been expressly alleged in the information. Defendant also argued an oral *Romero* motion at sentencing without raising any argument that the pleading was defective.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.